

Book Review: Reflections on Judging by Richard A. Posner

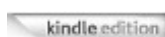
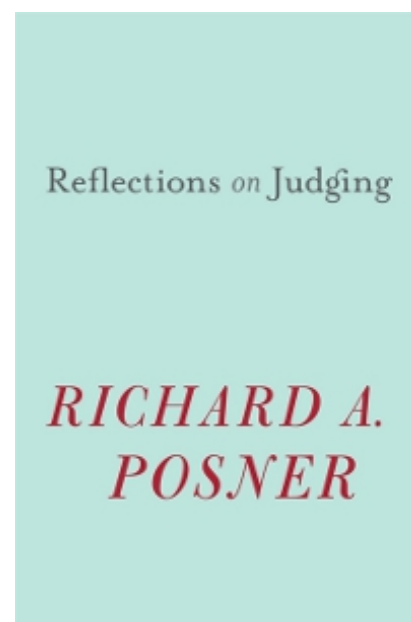
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With a legal career spanning six decades, in his latest book, Judge **Richard Posner** has turned to an assessment of the US justice system, focusing on federal judges' need to deal with the increasing complexity of the cases before them. **Reflections on Judging** offers a trenchant critique of federal judge's unwillingness to abandon their formalism for greater 'legal realism' – the consideration of the real world consequences of their decisions. Also part memoir, **Amanda Frost** praises the book as giving readers a glimpse into the mind of a brilliant, yet quirky, federal judge.



Reflections on Judging. Richard A. Posner. Harvard University Press. October 2013

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Judge Richard Posner's latest book, *Reflections on Judging*, is a wide-ranging critique of the United States justice system that spares no one's feelings. In the course of "reflecting," Posner, who has been a Judge of the United States Court of Appeals for the Seventh Circuit since 1981, attacks the U.S. Supreme Court, a number of prominent legal academics, appellate litigators, the Senate confirmation process, immigration judges, legal education, and his fellow judges on the United States Courts of Appeals. Posner is particularly dismayed by judges' use of formalistic legal reasoning to avoid grappling with practical problems, and so he urges the judiciary to focus less on interpretive theory and more on the real world consequences of their decisions. In other words, he urges judges to be pragmatists—a label often applied to his own style of judging.

At the heart of the book is Posner's contention that federal judges are failing to deal with the ever-increasing complexity of the cases before them. To give a few examples: the validity of a patent can turn on complicated questions about engineering and product design; the constitutionality of the FBI's search of a computer hard drive requires knowledge about the manner in which data is copied and stored electronically; and a compensatory damage award necessitates calculating projected profits and losses using advanced accounting principles. Posner contends that U.S. judges and lawyers have been unwilling to address this complexity, and instead fall back on formalist devices—such as obscure canons of interpretation, multifactor tests, and doctrines requiring deference to other decisionmakers—that do not resolve the problems at hand.

Posner urges his fellow judges to abandon formalism for "legal realism"—by which he means consideration of the real world consequences of their decisions. Here he takes issue with U.S. Supreme Court Justice Antonin Scalia, who authored the Supreme Court's opinion holding that the U.S. Constitution protects individual's right to own guns. Scalia wrote that the fact that hundreds more people will die from gun violence each year if the state is not permitted to bar gun ownership is irrelevant to the constitutional question. Posner disagrees, because in his view, "[i]f deaths are a consequences of deciding a case on

way rather than another, that's something for the judge to consider along with other consequences.”

To be clear, Posner does not advocate that judges simply rule in favor of the party they prefer win the case, regardless of what the law has to say about it. Rather, judicial decisions should consider *all* the practical effects the decision will have going forward, including the systemic effects on the predictability and administrability of the law. Judges err, says Posner, when they refuse to consider the consequences of their decision out of the mistaken perception that their role is limited to formal legal analysis, rather than grappling with the facts of the case itself.

The



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problem Posner describes is partly due to institutional design. Most federal judges are generalists, meaning they hear cases on a wide range of issues, and they have no particular training or background to help them deal with the increasing complexity of the cases before them. The average federal judge begins his service in middle-age, and thus may be less willing and able to master new forms of technology. (He notes that observers have described Supreme Court justices as “embarrassingly ignorant” about computers and modern communication.). Posner lists dozens of subjects that can arise in a typical federal judges’ docket, ranging from biochemistry to genetics to telecommunications. How is any federal judge to master those fields, and more, especially considering the time constraints within which judges are expected to resolve cases?

Posner’s critique is trenchant, but unfortunately his proposed “modest” solutions appear unlikely to resolve the large problems he identifies. Judges can only be effective legal realists if they can figure out the consequences of their decisions. But judges lack the tools to do that in the kinds of complex cases that Posner describes. Posner suggests that judges get more training before ascending to the bench, and urges law schools to do more to assist them. Yet it is hard to see how generic trainings would help judges obtain knowledge about the various questions of social science, statistics, economics, computer science, and physics they might need to help resolve a case touching on those topics. Posner also urges judges to look outside the record presented to them by advocates for help on such hard questions. As Posner well knows, this practice is controversial because it can lead judges to rely on untested and unreliable evidence. Finally, Posner suggests that advocates do a better job of focusing their case on the “real world” facts that will assist judges in making a decision—such as by providing maps and pictures, and explaining what is truly at stake for their clients. But as Posner acknowledges, lawyers will not alter the focus of their presentations to judges until judges alter their approach to resolving cases.

Although mostly focused on these policy concerns about the state of the judiciary, *Reflections on Judging* is also part memoir. The book begins with a short review of Posner’s own path to law school, his 13 years as a law professor, and then his 31 years as a judge on the United States Court of Appeals for the Seventh Circuit. Judge Posner’s academic writing and legal opinions have been both controversial and influential for decades, so it is fascinating to learn that he was deeply ambivalent about entering the legal profession, and that he frequently considered abandoning law altogether for some more intellectually interesting pursuit. In addition to these personal anecdotes, Posner sprinkles throughout the book snippets of legal history, summaries of numerous books and academic articles, and literary references ranging from Einstein to Orwell. *Reflections on Judging* gives readers a glimpse into the mind of a brilliant, albeit quirky, federal judge, leaving the reader feeling surprisingly optimistic about the state of the American Judiciary despite Posner’s vigorous critique. Any profession that attracts someone of his caliber to serve for so many decades must be doing something right.

Amanda Frost is a Professor of Law at American University Washington College of Law. Amanda writes and teaches in the fields of federal courts, civil procedure, statutory interpretation, judicial ethics, and transparency in government. Her articles have appeared in the Duke Law Journal, the Northwestern Law Review, the UCLA Law Review, and the Virginia Law Review, among others. Before entering academia, Professor Frost clerked for Judge A. Raymond Randolph on the U.S. Court of Appeals for the D.C. Circuit and spent five years as a staff attorney at Public Citizen, where she litigated cases at all levels of the federal judicial system. [Read more reviews by Amanda](#) .

